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No. 03-201

In the Supreme Court of the United States

CLAYTON HOSPITALITY GROUP, INC.,
Petitioner,

vs.

ORANGE COUNTY, FLORIDA and EARL K. WOOD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Orange County and Earl K. Wood tell this Court in their Brief in Opposition that (1) the issue of prompt judicial review was not presented to the courts below,[1] and (2) that the courts below correctly resolved the issue.[2] As to the latter claim, that is more properly presented to this Court if the Petition is granted and the parties argue the merits of the case. Therefore, Clayton Hospitality Group, Inc. will not burden the Court with an unnecessary response to an argument on the merits, but will save that argument for the appropriate time.

Clayton will reply to the argument of the Respondents that the issue was abandoned in the trial court. As the Respondents well know, that issue was specifically raised in the trial court, was ruled on by the trial court and was ruled on by the Court of Appeals. It is properly before this Court.

REASON FOR GRANTING THE WRIT

When Clayton Hospitality Group, Inc. filed its initial Complaint in the United States District Court for the Middle District of Florida, it included a claim that the license transfer provision of the Orange County Adult Entertainment Ordinance failed to comply with the requirements of *Freedman v. Maryland*, 380 U.S. 51 (1965). Specifically, Clayton argued that the provision did not provide prompt judicial review if a license transfer was denied. In ¶ 25 of the Complaint, Clayton said:

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[1] Question 1, Respondents' Brief in Opposition.

[2] Question 2.

25. The license transfer provisions of the Code are facially unconstitutional under the First Amendment to the United States Constitution:

a. There is not a specified, brief period of time within which the transfer must take place. The time limits in the ordinance are illusory, in that endless delay can result from a finding that the building is allegedly in violation of some provision of some statute, ordinance, rule, regulation or court order;

b. The ordinance is a grant of unbridled discretion to County officials and employees to deny an applicant a license by interminable delay, unnecessary inspections and questionable property improvements and modifications; and

c. There is no provision for prompt judicial review of a transfer denial. The only remedy for a wrongful rejection is a lengthy suit in state court, with no requirement of a prompt judicial decision.

After some discovery, the parties filed motions for summary judgment. In its motion, Clayton presented its

"prompt judicial review" claim. However, in footnote 23 of its motion, Clayton pointed out to the District Court that the issue was being presented to preserve it for appellate review, since the District Court could not rule in Clayton's favor on that issue:

> For purposes of preserving an issue for further review, Clayton also argues that the ordinance fails to provide for prompt judicial review when a transfer application is denied. *See* ¶ 32(3) of the Amended Complaint. Clayton readily acknowledges that this Court must rule against Clayton on this issue. *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999), *cert. denied*, 529 U.S. 1021, 120 S.Ct. 1423 (2000).

Subsequently, Clayton filed its Amended Complaint, and inadvertently omitted the claim that the transfer provision failed to provide for prompt judicial review. That omission was pointed out to Clayton's counsel by defense counsel at the required meeting to prepare the parties' Joint Pretrial Statement. Clayton acknowledged the inadvertent error, and advised defense counsel that another amended complaint would be filed adding only the accidently omitted claim. Clayton asked if the defendants would consent to that amendment, and defense counsel promised to respond to that request.

The parties filed the Joint Pretrial Statement. In it, Clayton informed the District Court that the issue of prompt judicial review was being presented to preserve it for later appellate review:

> As Clayton noted in its Complaint, the argument about prompt judicial review, a requirement of *Freedman v. Maryland*, is included in this action simply to preserve it for further review. This Court is foreclosed from deciding this issue in Clayton's favor by the ruling of the Eleventh Circuit in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999). Regardless of the outcome of this case, Clayton intends to present this claim for possible further review.
>
> However, attorneys for the County pointed out to Clayton's counsel, at the Joint Pretrial Statement meeting on May 6th, that the Amended Complaint did not include a challenge concerning judicial review. That omission was inadvertent. Clayton will seek to amend its Complaint to add the judicial review challenge.[3]

The Respondents argued to the trial court that the ordinance did provide prompt judicial review:

> As required by *FW/PBS*, the licensing authority must give an answer within a brief, specified time period. Accordingly, the transfer provision is clearly constitutional because the AEC provides for a prompt decision pursuant

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[3] Joint Pretrial Statement, p. 9, fn. 9.

> to section 3-29(a)(1) and prompt judicial review pursuant to section 3-10. *See, Redner* v. *Dean,* 29 F.3d 1494 (11th Cir. 1994), *cert. denied.,* 514 U.S. 1066 (1995) (stating that a 45-day time limit on the administrator's decision to grant or deny the license was reasonable); *Boss Capital. Inc. v. City of Casselberry,* 187 F.3d 1251 (11th Cir. 1999) (holding that "access to prompt judicial review is sufficient for adult entertainment licensing ordinances").[4]

However, before the defendants replied to the request by Clayton to correct the inadvertent omission, the District Court issued its ruling on the motions for summary judgment.[5] The District Court recognized that the issue was before it only for purpose of preserving it for future review, and expressly ruled on the issue:

> Clayton asserts that the AEC provision at issue fails both requirements of a specific time frame and prompt judicial review. However, Clayton concedes that his argument that the ordinance fails to provide prompt judicial review is not supported by the Eleventh Circuit Court of Appeals' decision in *Boss Capital, Inc. v. City of Casselberry*, 187

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[4] *Id.*, p. 11.

[5] The District Court had the Joint Pretrial Statement before it when it issued its ruling on the motions for summary judgment.

> F.3d 1251 (11th Cir. 1999). In *Boss Capital* the Eleventh Circuit Court of Appeals found that access to prompt judicial *review,* as opposed to judicial *resolution,* is sufficient for adult entertainment licensing ordinances. *See Boss Capital*, 187 F.3d at 1256-57. The Court agrees that under *Boss Capital*, the AEC sufficiently provides for prompt judicial review of the Tax Collector's decision. *See* (AEC § 3-10). Clayton concedes this as well, but makes his argument for the purpose of preserving it for appeal.
>
> Appendix to Petition, at 19a-20a.

The case went to the United States Court of Appeals for the Eleventh Circuit. That court also acknowledged that the point had been preserved for appellate review, and like the District Court, expressly ruled on the issue:[6]

> Clayton also argues for purposes of preserving the record, that the license-transfer provisions in the AEC are unconstitutional because they do not require courts to grant prompt judicial review. Defendants respond that, despite that the record excerpts contain a document labeled "First Amended Complaint," which includes this argument, the record only contains a document entitled "Amended

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[6] App. A to the Petition, at 9a, fn. 3.

> Complaint," in which Clayton abandoned this argument A review of the record has not revealed a document labeled "First Amended Complaint." Nevertheless, we have determined that "access to prompt judicial review [as opposed to prompt judicial resolution] is sufficient for adult entertainment licensing ordinances." *See Boss Capital, Inc. v. City of Casselberry*. 187 F.3d 1251, 1256-57 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000).

Respondents claim that the brevity of the treatment given to the prompt judicial review issue by the Eleventh Circuit indicated that it was not a ruling on the merits.[7] However, as Clayton conceded in both courts below, as the District Court said and as the Eleventh Circuit repeated, there was binding precedent in the circuit, in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1257 (1999), *cert. denied*, 529 U.S. 1020 (2000), and no lengthy discussion was necessary. The Circuit Court said all that was necessary to recognize that Clayton *had* presented the issue, and that *Boss Capital* compelled the panel to reject the claim.

CONCLUSION

The District Court and the Eleventh Circuit, relying on the Circuit's prior precedent in *Boss Capital, Inc.*, expressly held that the license transfer provision of the Orange County Adult Entertainment Code provided for prompt judicial review. The decision of the Eleventh

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[7] Brief in Opposition, at 7.

Circuit panel reaffirms that the Eleventh Circuit is in direct conflict with at least two, and as many as four, other federal circuits on the issue. Without question, the decision is squarely in conflict with the decision in *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 311 F.3d 1220 (10th Cir. 2002). That case is now pending in this Court.[8]

The Respondents never argue that there is not a conflict among the circuits, nor could they. The Court is well aware of the conflict, which it recognized in *City News & Novelty, Inc. v. City of Waukesha*, 121 U.S. 743 (2001) and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). Clayton asks the Court to either grant the Petition for Writ of Certiorari so the conflict can be resolved, or hold this case in abeyance until the Court rules on the pending petition in *Littleton*.

Respectfully submitted,

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[8] Docket No. 02-1649.